

No. 89-405

In The

Supreme Court, U.S.

FILED

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CLERK

Supreme Court of the United States
October Term, 1989

MOKI MAC RIVER EXPEDITIONS, INC.,

Petitioner,

vs.

ARIZONA DEPARTMENT OF REVENUE,

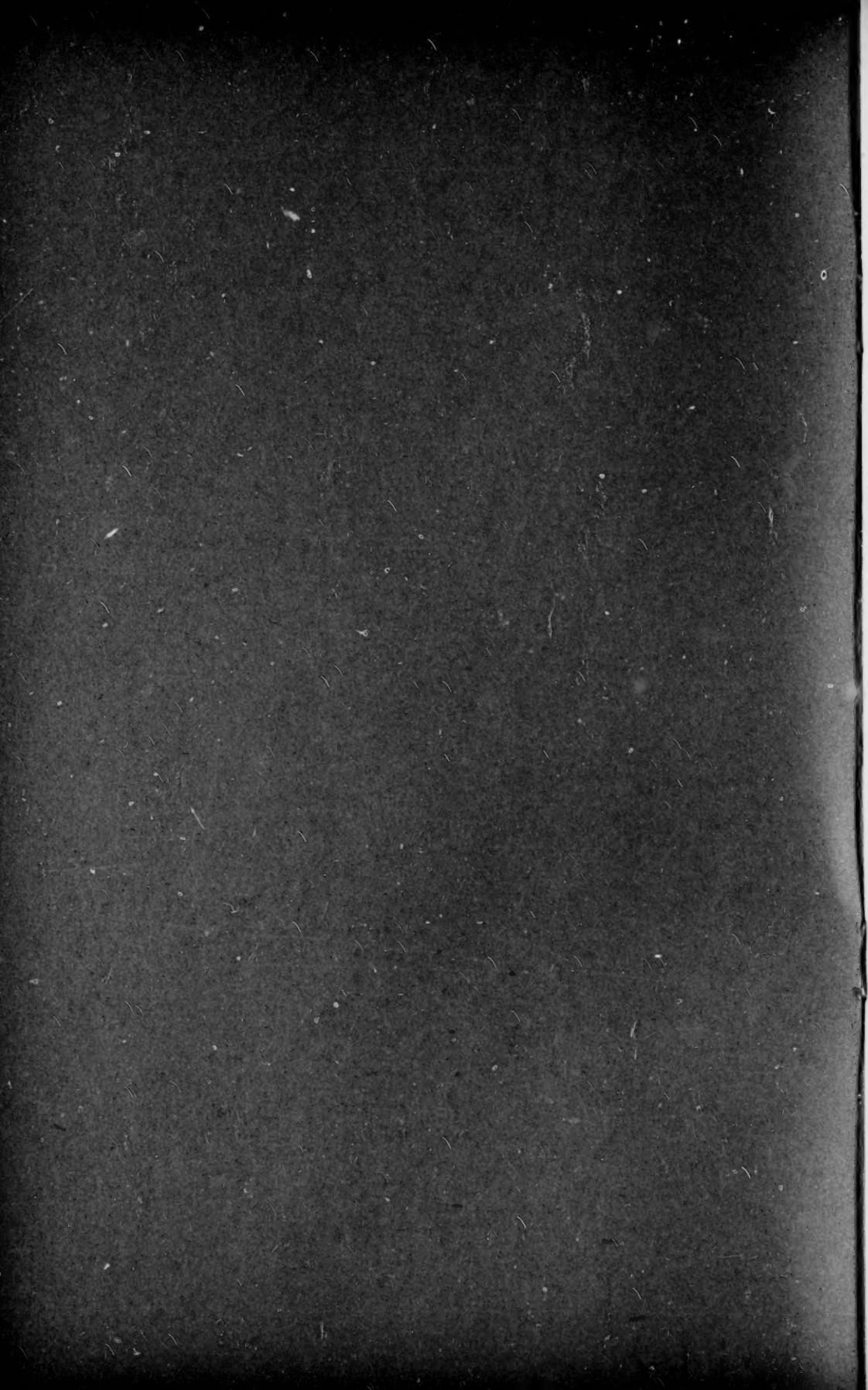
Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
State Of Arizona, Division One

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Do river excursions conducted entirely within Arizona provide sufficient nexus for Arizona to impose upon Moki Mac its transaction privilege tax?
- II. Is Arizona's transaction privilege tax which has been imposed only upon those river excursions which Moki Mac operates entirely within Arizona fairly apportioned?
- III. Are the State services which Moki Mac receives in the course of operating its amusement business in Arizona reasonably related to the general revenue tax imposed upon the privilege of operating this amusement business?

LIST OF PARTIES

The Respondent accepts the list of parties set forth by the Petitioner. Rule 28.1 of the Rules of the Supreme Court is not applicable.

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**RESPONDENT'S BRIEF IN OPPOSITION TO
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OPINION BELOW

The opinion of the Arizona Court of Appeals, Division One, is reported at 160 Ariz. 369, 773 P.2d 474 (Ct. App. 1989). The decision of the Supreme Court of Arizona denying the Petitioner's petition for review (June 13, 1989) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The commerce clause of the United States Constitution, article I, section 8, clause 3, authorizes Congress to regulate commerce among the several states.

The pertinent section of the Buck Act of 1940, codified as 4 U.S.C. § 105(a), precludes taxpayers from asserting immunity from state taxation based upon the fact that their taxable activity occurs within federal enclaves.

The relevant Arizona statutes are: Ariz. Rev. Stat. Ann. §§ 42-1309, 1314 (1980) and Ariz. Rev. Stat. Ann. §§ 42-1306, 1310.14, 1317 (Supp. 1988). These statutes are set forth in Appendix I.

STATEMENT OF THE CASE

I. Statement of Facts.

The Respondent accepts the Petitioner's statement of facts with one exception. The Petitioner states that the franchise fee paid to the National Park Service was "in an amount equal to 2.5% of Moki Mac's gross receipts on river trips through the Grand Canyon." Petition for Writ of Certiorari at 4. However, the record on appeal only indicates that Moki Mac paid National Park service fees.

Neither the fee amount, nor the percentage of gross receipts paid to the Park Service is specified in the record.

The Respondent also supplements the Petitioner's statement of facts with the following facts from the record. Although Moki Mac conducts river rafting adventures in various western states, the Arizona Department of Revenue has only taxed Moki Mac's Colorado River trips which occur entirely within Arizona. Also, Moki Mac does not pay sales, use or privilege taxes to Utah in connection with its river rafting trips. *Department of Revenue v. Moki Mac River Expeditions, Inc.*, 160 Ariz. 369, ___, 773 P.2d 474, 476 (Ct. App. 1989).

Moki Mac refers its customers to persons or companies for transportation across Arizona highways, to and from the river trips. In some instances, the customers also arrange for their cars to be shuttled across Arizona highways. In addition, Moki Mac advertises in Arizona by mailing information to Arizona residents. *Moki Mac*, 160 Ariz. at ___, 773 P.2d at 476.

The Coconino County Sheriff's Office (a political subdivision of Arizona) provides certain law enforcement services within the Grand Canyon National Park pursuant to a cooperative agreement for concurrent criminal jurisdiction with the National Park Service. These services include search and rescue operations, as well as civil and criminal investigations. *Moki Mac*, 160 Ariz. at ___, 773 P.2d at 476.

II. Proceedings Below

The Respondent accepts the Petitioner's summary of the proceedings below, with one exception. The Petitioner

asserts that the trial court "entered judgment in Moki Mac's favor because of the lack of nexus with the taxing state." Petition at 5. However, the court's judgment was based solely on its determination that the "activity engaged in by [Moki Mac] within the State of Arizona does not constitute engaging or continuing in business within this State." *Moki Mac*, 160 Ariz. at ___ 773 P.2d at 477. Pursuant to Ariz. Rev. Stat. Ann. § 42-1314 (1980) (presently Ariz. Rev. Stat. Ann. §§ 42-1310.14, 1317 (Supp. 1988)) (See Appendix I), only those persons engaging or continuing in business in Arizona are subject to the transaction privilege tax. Therefore, the trial court's judgment was based upon the State tax statute, rather than the commerce clause.

REASONS FOR DENYING THE WRIT

The lower court has correctly determined that Arizona's tax complies with the commerce clause constraints established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 280 (1977). This Court's objective in reviewing state taxation of interstate commerce has been to discern the proper balance between "the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers." *Boston Stock Exchange v. State Comm'n*, 429 U.S. 318, 329 (1977). Arizona's tax on Moki Mac's Arizona river excursions strikes the proper balance between the State's taxing authority and Moki Mac's right to unimpaired interstate commerce for two reasons. First, the Arizona Department of Revenue has restricted its tax assessment to only those river trips which Moki Mac operates exclusively in Arizona.

Secondly, the tax is applied equally to all river rafting companies which operate in Arizona, regardless of whether their business is intrastate or interstate in nature. Petition at 9. Thus, Arizona has prudently restricted the application of its taxes to comply with the commerce clause constraints.

ARGUMENT I

MOKI MAC'S ARIZONA ACTIVITIES PROVIDE A SUBSTANTIAL NEXUS WITH THE STATE

In *Complete Auto*, this Court held that state taxation of interstate commerce must comply with four requirements. First, the tax may only be applied to an activity which has a substantial nexus with the taxing state. *Complete Auto*, 430 U.S. at 280. The Arizona tax on Moki Mac satisfies this requirement.

The tax at issue is imposed upon the privilege of engaging in the business of operating an amusement within Arizona. Ariz. Rev. Stat. Ann. § 42-1314 (1980). The Arizona Department of Revenue has taxed only those river rafting excursions which Moki Mac operates entirely within Arizona. In conducting its Arizona river trips, Moki Mac utilizes a seasonal residence for employees and a storage facility in Arizona. This use of Arizona property and operation of Arizona river trips provide a substantial nexus for the Arizona tax.

In *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232 (1987), this Court held that the taxpayer's sales representatives alone, though independent contractors, satisfied the requisite degree of nexus to support the State's jurisdiction to impose its wholesale

tax on Tyler. *Tyler Pipe*, 483 U.S. at 251. In the present case, Moki Mac's contacts with Arizona are at least as extensive as those identified in *Tyler Pipe*.

Moki Mac's substantial nexus with Arizona is not diminished by the fact that its river excursions occur within federal enclaves located in Arizona. In the Buck Act of 1940, Congress authorizes each state to impose sales or use taxes upon activities occurring within federal enclaves:

No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such state to the same extent and with the same effect as though such area was not a Federal area.

4 U.S.C. § 105(a). The legislative history of the Buck Act reveals that Congress intended the Act to supply to transaction privilege taxes such as the one imposed upon Moki Mac:

Subsection (c) defines the term "income tax" to mean any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts. This definition, as well as the preceding definition of sales or use tax, must of necessity cover a broad field because of the great variations to be found between the different State laws. The intent of your committee in laying down such a broad definition was to include

therein any State tax (whether known as a corporate-franchise tax or business-privilege tax, or by any other name) if it is levied on, with respect to, or measured by, net income, gross income, or gross receipts.

S. Rep. No. 1625, 76th Cong., 3d Sess., 2 (1940). Therefore, the fact that Moki Mac's river excursions occur within federal enclaves is irrelevant to the Court's commerce clause scrutiny of the tax in the present case.

Petitioner contends that this Court has never determined whether an activity on federal land may provide sufficient nexus for state taxation. Petition at 7-8. However, in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 612 (1981), the Court upheld a State severance tax on coal mined on federal lands. This Court affirmed the State court's holding that a substantial nexus supported the tax. *Commonwealth Edison*, 453 U.S. at 617. Furthermore, this Court has recently held that a state severance tax on oil and gas production on an Indian reservation is reasonably related to state services. *Cotton Petroleum Corp. v. New Mexico*, ____ U.S. ___, 109 S.Ct. 1698, 1714-15 (1989). Therefore, the Court need not grant the petition simply to reaffirm that a taxable activity which occurs on federal land may provide adequate nexus for state taxation.

ARGUMENT II

THE TAX ON MOKI MAC IS FAIRLY APPORTIONED

The second commerce clause requirement is that the tax be fairly apportioned. *Complete Auto*, 430 U.S. at 280.

The tax on Moki Mac's river excursions is fairly apportioned because Arizona has not taxed any of the river excursions which Moki Mac conducts in other states. Furthermore, the Arizona river trips occur entirely within Arizona.

In *Tyler Pipe*, this Court determined that Washington's business and occupation tax on Tyler's wholesale transactions involving products manufactured outside of the State was fairly apportioned. The Court rejected Tyler's argument that its foreign manufacturing activities contributed to the value of the taxable wholesale transactions. Instead, the Court determined that the tax was imposed only upon wholesale transactions which occurred in Washington, rather than upon Tyler's unitary activity of wholesaling and manufacturing. *Tyler Pipe*, 483 U.S. at 251. The State tax in *Tyler Pipe* is very similar to the tax on Moki Mac. Both taxes are imposed on the privilege of engaging in business activities and are measured by gross proceeds of sales. *Tyler Pipe*, 483 U.S. at 234-35; cf. Ariz. Rev. Stat. Ann. § 42-1314 (1980). However, in *Tyler Pipe* the wholesale transactions which were the focus of the tax transpired across state borders.¹ Yet, Moki Mac's river excursions occur entirely within Arizona. Therefore, according to the rationale in *Tyler Pipe*, the tax on Moki Mac is fairly apportioned.

Moki Mac relies upon *Goldberg v. Sweet*, __ U.S. __, 109 S.Ct. 582 (1989) to support its contention that Arizona's tax is not fairly apportioned. However, in *Goldberg*, this Court held that Illinois' tax on interstate telecommunications was fairly apportioned. *Goldberg*, __ U.S. at

¹ Although Tyler's Washington representatives contacted customers, solicited orders and provided the company with information, Tyler's out-of-state executives also directed the company's Washington solicitations. *Tyler Pipe*, 483 U.S. at 249.

____ 109 S.Ct. at 591. Moreover, the tax on Moki Mac satisfies the internal and external consistency tests reiterated in the *Goldberg* decision. *Goldberg*, ____ U.S. at ___, 109 S.Ct. at 589. The tax, as applied to Moki Mac, is internally consistent because if every state taxed only those river trips which occurred within their respective borders, only one state would tax each river trip.

The external consistency test analysis requires that the Court "examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity." *Goldberg*, ____ U.S. at ___, 109 S.Ct. at 589. In *Goldberg*, the Court rejected the taxpayers' argument that "any tax assessed on the gross charge of an interstate activity cannot reasonably reflect in-state business activity and therefore must be unapportioned." *Goldberg*, ____ U.S. at ___, 109 S.Ct. at 589. Therefore, the Court should reject this same argument raised by Moki Mac.

ARGUMENT III

THE TAX ON MOKI MAC IS FAIRLY RELATED TO SERVICES PROVIDED BY THE STATE

The Petitioner concedes that the tax satisfies the third commerce clause requirement, that it not discriminate against interstate commerce. However, contrary to the Petitioner's claim, the tax also satisfies the fourth requirement that it be fairly related to the services provided by Arizona. *Complete Auto*, 430 U.S. at 280.

The tax imposed upon Moki Mac is a general revenue tax. Ariz. Rev. Stat. Ann. § 42-1309 (1980) (presently Ariz. Rev. Stat. Ann. § 42-1306 (Supp. 1988)). See Appendix I.

Therefore, the Court need not determine whether the value of the specific services provided by the State is reasonably related to the amount of taxes imposed upon Moki Mac. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 (1981). The benefit of operating its river excursions in a civilized society justifies Moki Mac's contribution to Arizona's general revenue. *Commonwealth Edison*, 453 U.S. at 628; *Cotton Petroleum Corp. v. New Mexico*, ___ U.S. ___ ___ 109 S.Ct. 1698, 1714-15 (1989).

Furthermore, the record establishes that the Coconino County Sheriff's Office (a political subdivision of Arizona) provides law enforcement services within the Grand Canyon National Park, pursuant to a cooperative agreement with the National Park Service. These services include search and rescue operations, as well as civil and criminal investigations. *Moki Mac*, 160 Ariz. at ___, 773 P.2d at 476.²

The Arizona storage facilities and residence which Moki Mac utilizes in the course of its amusement business are located outside of the federal enclaves. This property also would be entitled to law enforcement services. In addition, Moki Mac and its customers utilize state highways. *Moki Mac*, 160 Ariz. at ___, 773 P.2d at 476. Therefore, the "measure of tax imposed upon Moki Mac is reasonably related to the taxpayer's activities or presence in the State." *Commonwealth Edison*, 453 U.S. at 628.

² The Coconino County Government receives a portion of the general revenues attributable to the transaction privilege tax imposed upon Moki Mac. Ariz. Rev. Stat. § 42-1306 (Supp. 1988).

CONCLUSION

The lower court has correctly determined that Arizona's tax complies with the four commerce clause constraints established in the *Complete Auto* decision. Accordingly, the Respondent respectfully requests that the Court deny the petition for writ of certiorari.

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APPENDIX I

Relevant Arizona Tax Statutes

Levy of tax; purposes; distribution

Ariz. Rev. Stat. Ann. § 42-1309 (1980)

A. There is levied and there shall be collected by the department, for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes and to reduce the levy on property for public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, in accordance with the schedule as set forth in §§ 42-1310, 42-1310.01, 42-1310.02, 42-1311, 42-1312, 42-1312.01 and 42-1313 through 42-1315.

B. If any funds remain after the payments are made for state purposes, as provided for by subsection A of this section, the remainder of the funds shall be paid into the state school fund for educational purposes.

Ariz. Rev. Stat. Ann. § 42-1306 (Supp. 1988)

A. There is levied and there shall be collected by the department, for the purpose of raising public money to be used in liquidating the outstanding obligations of the

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state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the municipalities and counties in the state, to reduce or eliminate the annual tax levy on property tax for state, municipal and county purposes and to reduce the levy on property for the public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as prescribed by this article.

B. If any funds remain after the payments are made for state purposes, as provided for by subsection A, the remainder of the funds shall be paid into the state school fund for educational purposes.

C. The tax levied by and collected pursuant to this article is designated the "transaction privilege tax."

Operating amusement places; exception; leasing or renting of property; exemption

Ariz. Rev. Stat. Ann. § 42-1314 (1980)

A. The tax imposed by § 42-1309, subsection A shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the following businesses:

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1. Operating or conducting theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiard and pool parlors and bowling alleys, public dances, dance halls, boxing and wrestling matches and any business charging admission fees for exhibition, amusement or instruction, other than projects of bona fide religious or education institutions.

2. Leasing or renting tangible personal property for a consideration. Sales of tangible personal property to be leased or rented to a person engaged in the business of leasing or renting such tangible personal property for a consideration shall be deemed to be resale sales. The tax prescribed under the terms of this paragraph shall not apply to the leasing or renting of the property which if it had been purchased instead of leased or rented by the lessee would have been exempt pursuant to the provisions of § 42-1312, subsection A, paragraphs¹ 6, 9 and 10, § 42-1312.01, § 42-1321, subsection A, paragraph 5, § 42-1409, subsection A, paragraph 10 or § 42-1409, subsection B.

3. Leasing or renting for a consideration the use or occupancy of real property, including any improvements, rights or interest in such property. From and after June 30, 1980, the tax is levied on and shall be collected from the person leasing or renting the property to the tenant in actual possession. If the person so leasing or renting to the tenant in possession is not engaged in the business of leasing or renting real property, the tax is levied on and

¹ So in original. Probably should read "paragraphs".

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shall be collected from the lessor nearest such person in any chain of subleases on the property who is engaged in the business of leasing or renting real property. When a landlord has installed individual utility meters for each tenant and separately charges each such tenant for such service based on the readings of each such meter, such charges are exempt from the tax imposed by this article.

B. The tax prescribed under the terms of subsection A, paragraph 3 of this section shall not apply to any written lease or rental agreement entered into prior to December 1, 1967, provided that such exception shall not apply to the businesses of hotels, guest houses, dude ranches and resorts, rooming houses, apartment houses, office buildings, automobile storage garages, parking lots or tourist camps, or to the extension or renewal of any such written leases or rental agreement and provided further that such exemption shall not apply to any such written lease or rental agreement unless a rental occupancy tax is paid pursuant to chapter 11 of this title.²

C. The tax prescribed under the terms of subsection A of this section shall not apply to events sponsored by the Arizona coliseum and exposition center board or county fair commissions.

D. Films used in operating or conducting theaters or movies, the operation of which is taxed under subsection A, paragraph 1, of this section, shall be exempt under subsection A, paragraph 2 of this section.

² Section 42-1701 et seq.

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E. For purposes of subsection A, paragraph 2 of this section, persons engaged in the business of, or continuing in the business of, coin-operated washing, drying and dry cleaning machines or coin-operated car washing machines shall not be deemed to be engaged in the business of leasing or renting tangible personal property for a consideration. This exemption shall not apply to suppliers or distributors of tangible personal property sold or leased to persons engaged in the operation of coin-operated washing, drying, dry cleaning and car wash establishments.

F. Effective January 1, 1970 the tax prescribed under the terms of subsection A, paragraph 3 of this section shall not apply to the leasing or renting of dwelling units, lodging facilities or trailer or mobile home spaces if the units, facilities or spaces are intended to serve as the principle or permanent place of residence for the lessee or renter thereof. For the purpose of this subsection, "principal or permanent place of residence" means a unit, facility or space leased or rented to a single tenant thirty or more consecutive days other than a hotel, motel, dude ranch, resort or campground.

Imposition of tax; rates; distribution base

Ariz. Rev. Stat. Ann. § 42-1317 (Supp. 1988)

A. The tax imposed by this article is levied and shall be collected at the rate of:

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1. Five per cent of the tax base as computed for the business of every person engaging or continuing in this state in the following business classifications:

- (a) Transporting classification.**
- (b) Utility classification.**
- (c) Telecommunications company classification.**
- (d) Telecommunications resale classification.**
- (e) Pipeline classification.**
- (f) Private car line classification.**
- (g) Publication classification.**
- (h) Job printing classification.**
- (i) Prime contracting classification.**
- (j) Owner builder sales classification.**
- (k) Amusement classification.**
- (l) Restaurant classification.**
- (m) Personal property rental classification.**
- (n) Retail classification.**

2. Three and three-fourths per cent of the tax base as computed for the business of every person engaging or continuing in this state in the commercial lease classification.

3. Four per cent of the tax base as computed for the business of every person engaging or continuing in this state in the transient lodging classification.

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4. Fifteen thirty-seconds per cent of the tax base as computed for the business of every person engaging or continuing in this state in the animal feed classification.

5. Three and one-eighth per cent of the tax base as computed for the business of every person engaging or continuing in this state in the mining classification.

B. Twenty per cent of the tax revenues collected from persons on account of engaging in business under the business classifications listed in subsection A, paragraph 1, subdivisions (a) through (j) of this section is designated as distribution base for purposes of § 42-1341.

C. Forty per cent of the tax revenues collected from persons on account of engaging in business under the business classifications listed in subsection A, paragraph 1, subdivisions (k) through (n) of this section is designated as distribution base for purposes of § 42-1341.

D. Thirty-two per cent of the tax revenues collected from persons on account of engaging in business under the business classification listed in subsection A, paragraph 5 of this section is designated as distribution base for purposes of § 42-1341.

E. Fifty-three and one-third per cent of the tax revenues collected from persons on account of engaging in business classifications listed in subsection A, paragraphs 2 and 4 of this section is designated as designated as distribution base for purpose of § 42-1341.

F. Fifty per cent of the tax revenues collected from persons on account of engaging in business under the business classifications listed in subsection A, paragraph

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3 of this section is designated as distribution base for purposes of § 42-1341.

Amusement classification

Ariz. Rev. Stat. Ann. § 42-1310.14 (Supp. 1988)

A. The amusement classification is comprised of the business of operating or conducting theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiard or pool parlors, bowling alleys, public dances, dance halls, skating rinks, tennis courts, video games, pinball machines, sports events or any other business charging admission or user fees for exhibition, amusement, entertainment or instruction, other than activities or projects of bona fide religious or educational institutions. The amusement classification does not include the operation or sponsorship of events by the Arizona coliseum and exposition center board or county fair commissions.

B. The tax base for the amusement classification is the gross proceeds of sales or gross income derived from the business.
